

\*E-FILED: December 28, 2012\*

NOT FOR CITATION  
 IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 SAN JOSE DIVISION

AREAS USA SJC, LLC,

No. C11-04487 HRL

Plaintiff,

**FURTHER PRETRIAL ORDER**

v.

**[Dkts. 131, 135, 137, 141, 143, 145, 175]**MISSION SAN JOSE AIRPORT, LLC; ET  
AL.,Defendants.  
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The suit brought by Areas USA SJC, LLC (“Areas”) against Mission San Jose Airport, LLC and Mission Yogurt, Inc. (collectively “Mission”) is set for Jury Trial on January 7, 2013 at 9:00 a.m. The Court held a Pretrial Conference on December 18, 2012 and has scheduled a continuation of that Pretrial Conference for January 3, 2013 at 10:00 a.m. in Courtroom 2, 5th Floor, San Jose. The transcript of both sessions of the Pretrial Conference will serve as the Pretrial Order.<sup>1</sup>

**1. Adverse Inference Instruction**

At the December 18 Pretrial Conference the Court ruled on the motions in limine filed by the parties. One such ruling was that it would give an adverse inference jury instruction based on Mission’s Motion in Limine concerning Areas’ noncompliance with discovery requests.<sup>2</sup> (Dkt. 137). The Court intends to give the following adverse inference jury instruction:

<sup>1</sup> Counsel may obtain a recording of the December 18 Conference (as well as the upcoming January 3 Continuation) by contacting the Courtroom Deputy.

<sup>2</sup> After the Court ruled from the bench on this motion, Areas filed (without seeking Court approval) a brief styled “Further Opposition,” which was an attempt to induce the Court to change its mind. The filing was improper, and the attempt fails.

Before a case goes to trial, each party is entitled under the law to request from another party documents that are relevant to any party's claim or defense. In this case, Mission repeatedly asked Areas to produce any and all documents referring to or discussing Areas' evaluation of whether or not to build out the original TA-21 space itself, and any and all documents referring to or reflecting the reasons why it chose not to build out the space. Areas repeatedly denied that it ever had any intention to build out the original TA-21 space and denied that it had any documents referring to or discussing any such intention or evaluation of the space. However, the testimony of one of Areas' officers, the testimony of one of Areas' former officers, the testimony of a third party who was present when such discussions took place, plus at least one Areas document produced by a third party, have satisfied the Court that Areas withheld information and documents that it should have produced. The jury may infer that Areas' refusal was because it felt that disclosure would be harmful to its case against Mission.

## 2. Exhibits

At the December 18 Pretrial Conference, the Court did not rule on the parties' objections to proposed exhibits. The Court has since reviewed Areas' objections to Mission's exhibit list, the exhibits themselves, and Mission's trial exhibit list.

The Court **OVERRULES** Areas' objections to the following exhibits: 27, 45, 47, 48, 57, 65-68, 71, 73-75, 78, 81-84, 88, 91, 92, 95, 109, 113, 118, 124, 125, 156, 250-258, 261-263, 267, 268, 271, 272, 274, 284, 286-318, 320, 322, 325, 331, 332, 335, 341, 342. The Court finds these exhibits to be relevant and either admissible for non-hearsay purposes, or hearsay but subject to one of the hearsay exceptions. The Court rejects Areas' remaining objections.

The Court **SUSTAINS** Areas' objection to exhibits 34, 50, 106, 259, and 260 because these exhibits are either irrelevant or inadmissible hearsay. Consistent with the Court's ruling on Areas' Motion in Limine #4, exhibits 344-346 may not be introduced until and unless there is a jury verdict against Areas for punitive damages.

The Court has also reviewed Mission's objections to Areas' list of trial exhibits, the exhibits themselves, and Areas' trial exhibit list. The Court **OVERRULES** Mission's objections to the following exhibits: 3, 16, 19, 21, 22, 33, 55, 61, 70, 76, 112, 128, 149, 172, 173, 175, 176-178. The Court finds these exhibits to be relevant and either admissible for non-hearsay purposes, or hearsay but subject to one of the hearsay exceptions. The Court rejects Mission's remaining objections.

The Court **SUSTAINS** Mission's objections to the following exhibits: 23, 37, 49, 53, 54, 127, 146, 160, 161, 162, 163-170, 174. The Court finds these exhibits to be either irrelevant,

1 inadmissible hearsay, or more prejudicial than probative. According to Mission, Areas has agreed  
2 to withdraw exhibits 144, 145, 151, and 154.

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4 IT IS SO ORDERED.

5 Dated: December 28, 2012

  
6 HOWARD R. LLOYD  
7 UNITED STATES MAGISTRATE JUDGE  
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**Counsel are responsible for distributing copies of this document to co-counsel who have not registered for e-filing under the court's CM/ECF program.**